

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
R.E. VINCENT, E.S. WHITE, J.E. STOLASZ
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**JEREMY J. BENJAMIN
LANCE CORPORAL (E-3), U.S. MARINE CORPS**

**NMCCA 200700860
GENERAL COURT-MARTIAL**

Sentence Adjudged: 18 June 2007.

Military Judge: Col Ralph Kohlmann, USMC.

Convening Authority: Commanding General, II Marine Expeditionary Force, Camp Lejeune, NC.

Staff Judge Advocate's Recommendation: Col R.D. Hine, USMCR.

For Appellant: Capt Kyle Kilian, USMC.

For Appellee: LCDR R.W. Weiland, JAGC, USN; Capt Geoffrey Shows, USMC.

16 September 2008

OPINION OF THE COURT

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Senior Judge:

This case is before the court on appeal under Article 66, Uniform Code of Military Justice, 10 U.S.C. § 866.

On appeal, the appellant raises four assignment of error: (1) the Government unreasonably multiplied the charges against him; (2) if the charges are not unreasonably multiplied, then they are multiplicitous for sentencing; (3) the military judge abused his discretion by admitting sentencing evidence that was not directly related to or resulting from his offenses; and (4) his sentence is unjustifiably severe as compared to those of his co-conspirators.

After carefully considering the record of trial, the appellant's four assignments of error and brief in support thereof, and the Government's answer, we conclude the findings and sentence are correct in law and fact, and no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

I. Background

A military judge, sitting as a general court-martial, convicted the appellant, pursuant to his pleas, of attempted larceny, conspiracy to commit larceny, willful damage to military property, willful suffering the wrongful disposition of military property, larceny, and housebreaking in violation of Articles 80, 81, 108, 121, and 130, Uniform Code of Military Justice, 10 U.S.C. §§ 880, 881, 908, 921, and 930. The appellant was sentenced to 8 years confinement, reduction to pay grade E-1, forfeiture of all pay and allowances, and a dishonorable discharge. The convening authority approved the findings and sentence as adjudged, but, pursuant to a pretrial agreement, suspended all confinement in excess of 7 years for the period of confinement served plus 12 months.

In December, 2008, the appellant conspired with Lance Corporal (LCpl) Floyd J. Brito, USMC, and LCpl Ismael G. Santos, USMC, to break into the 8th Communications Battalion armory on board Camp Lejeune and steal weapons. To prepare, the appellant and LCpl Brito bought items they thought would be helpful, such as rope, bolt cutters, and a sledgehammer. Later that day, the appellant, LCpl Brito, and LCpl Santos went to the 8th Communications Battalion supply building, which housed the armory. The appellant broke a window at the back of the building. The three men then climbed through the window and attempted to break down the armory wall with the sledgehammer. When the wall did not break, they decided instead to steal some of the other military property in the building. They took approximately \$14,000.00 worth of military property and divided it amongst themselves. About three weeks later, when the appellant learned the authorities knew of his crimes, he called his girlfriend and instructed her to throw away the stolen military property at their apartment. The appellant's girlfriend then disposed of the property by putting it in a couple of different garbage dumpsters.

II. Discussion

A. Unreasonable Multiplication of Charges

The appellant asserts that, because he engaged in a single course of conduct, the Government unreasonably multiplied the charges by accusing him of willful damage to Government property (Specification 1 of Charge III) in addition to housebreaking (Charge V), and by accusing him of larceny (Charge IV) and

housebreaking (Charge V) in addition to conspiracy to commit larceny (Charge II).¹

After examining the entire record and considering the factors identified in *United States v. Quiroz*, 57 M.J. 583 (N.M.Ct.Crim.App. 2002)(*en banc*), *aff'd*, 58 M.J. 183 (C.A.A.F. 2003)(summary disposition), we conclude the charges in this case were not unreasonably multiplied. See *United States v. Paxton*, 64 M.J. 484, 491 (C.A.A.F. 2007)(applying *Quiroz* factors); *United States v. Pauling*, 60 M.J. 91, 95 (C.A.A.F. 2004). Each charge is aimed at a distinctly separate criminal act. See *United States v. Neblock*, 45 M.J. 191, 197 (C.A.A.F. 1996). Further, the number of charges and specifications does not misrepresent or exaggerate the appellant's criminality or unreasonably increase his punitive exposure, and there is no evidence of prosecutorial overreaching.

B. Multiplicity for Sentencing

Alternatively, the appellant argues that the charge of willful damage to Government property is multiplicitious for sentencing with the charge of housebreaking, and that the charges of larceny and housebreaking are multiplicitious for sentencing with the conspiracy charge.²

"If offenses are . . . not multiplicitious for findings purposes, then they are not multiplicitious for sentencing." *United States v. Balcarczyk*, 52 M.J. 809, 812 (N.M.Ct.Crim. App. 2000)(quoting *United States v. Oatney*, 41 M.J. 619, 623 (N.M.Ct.Crim.App. 1994)). See *Paxton*, 64 M.J. at 490-91. Nevertheless, "the military judge often will endeavor to ameliorate what appears to be an *unreasonable multiplication of charges* by determining that the charges should be considered multiplicitious for sentencing . . . As a result, the same word -- "multiplicitious" -- has been used to describe two different matters: (1) a non-discretionary legal limit on offenses during findings; and (2) a discretionary decision by the military judge to combine offenses during sentencing." *United States v. Britton*, 47 M.J. 195, 202 (C.A.A.F. 1997)(citing *United States v. Traxler*, 39 M.J. 476, 480 (C.M.A. 1994) and RULE FOR COURTS-MARTIAL 1003(c)(1)(C), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1995 ed.)) (emphasis added)(internal citation omitted). This second matter is "an equitable remedy a military judge is free to employ when

¹ The appellant did not argue at trial, and does not appear to argue on appeal, that the charge of attempted larceny (Charge I) is part of the unreasonable multiplication of charges. Nevertheless, we have considered that charge and specification as well in evaluating this issue.

² Given the telescoping nature of those allegations, the appellant is actually arguing that all of those charges -- wrongful damage to Government property, housebreaking and larceny -- are multiplicitious for sentencing with conspiracy to commit larceny. The military judge ruled that the charge of willfully suffering the wrongful disposition of military property (Specification 2 of Charge III) was multiplicitious for sentencing with larceny (Charge IV). Record at 138.

separately punishing each offense would cause an unjust or inappropriate result." *Balcarczyk*, 52 M.J. at 812-13.

We conclude the military judge did not abuse his discretion by treating the offenses as distinct for sentencing. Further, although aware of our independent authority under Article 66(c), UCMJ, we decline to exercise that authority, as we conclude separately punishing each offense in this case does not produce an unjust or inappropriate result.

C. Uncharged Misconduct at Presentencing Hearing

In his third assignment of error, the appellant alleges the military judge erred by admitting evidence of uncharged misconduct, namely the appellant's plan to use the weapons stolen from the battalion armory to rob a gas station. This evidence was admitted through two witnesses, over defense objection, and through Prosecution Exhibits 3, 4, 5, and 6, with the appellant's consent.

We conclude this evidence was properly admitted as aggravation evidence.³ The evidence demonstrated the appellant's motivation in committing the charged offenses, and his intended use of the expected fruits of his crimes. Such evidence is directly related to the appellant's offenses. *See* R.C.M. 1001(b)(4)(2005 ed.); *see also United States v. Hardison*, 64 M.J. 279, 281-82 (C.A.A.F. 2007). Further, the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the sentencing authority, or by considerations of undue delay, waste of time, or cumulativeness. *See* MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.). Indeed, the military judge explicitly stated he was sentencing the accused solely for the offenses of which he was convicted. Record at 136.

D. Sentence Disparity

In his final assignment of error, the appellant contends his sentence is inappropriately severe and highly disparate from the sentence of his co-conspirators, LCpl Brito and LCpl Santos. He argues that we should affirm a sentence of only 54 months. Appellant's Brief at 23. We disagree.

While the appellant has demonstrated his case is closely related to those of LCpl Brito and LCpl Santos, he fails to show either that his sentence is widely disparate from their sentences, or rises to the level of obvious miscarriage of justice. *See United States v. Lacy*, 50 M .J. 286, 288 (C.A.A.F.

³ Because we conclude the military judge correctly admitted this evidence, we need not discuss the different standards of review applicable to the witness testimony, to which the appellant objected (abuse of discretion), and the prosecution exhibits, to which the appellant waived any objection (plain error).

1999); *United States v. Stotler*, 55 M.J. 610, 612 (N.M.Ct.Crim.App. 2001).

All three co-conspirators received practically identical sentences, except for the amount of confinement.⁴ LCpl Brito was adjudged 7 years confinement, and the CA suspended all but 54 months of that confinement.⁵ LCpl Santos was adjudged 7 years confinement, and the CA suspended all but 5 years of that confinement.⁶ The appellant was adjudged 8 years confinement, and the CA suspended all but 7 years of that confinement.

Sentencing criminal offenders involves "'individualized consideration' of the particular accused 'on the basis of the nature and seriousness of the offense and the character of the offender.'" *United States v. Snelling*, 14 M.J. 267, 268 (C.M.A. 1982)(quoting *United States v. Mamaluy*, 27 C.M.R. 176, 180-81 (1959)). We conclude the differences in these sentences are not so great as to exceed relative uniformity, or rise to the level of an obvious miscarriage of justice or abuse of discretion. See *Stotler*, 55 M.J. 612; *United States v. Swan*, 43 M.J. 788, 793 (N.M.Ct.Crim.App. 1995). Further, the appellant hatched the plan, recruited the other two into the conspiracy, and was the moving force in carrying out the crimes. It is completely rational his sentence would be somewhat harsher than those of his co-conspirators.

III. Conclusion

The findings and sentence, as approved by the convening authority, are affirmed.

Senior Judge VINCENT and Judge STOLASZ concur.

For the Court

R.H. TROIDL
Clerk of Court

Senior Judge WHITE participated in the decision of this case prior to detaching from the court.

⁴ LCpl Santos was also sentenced to a fine of \$1,500.00.

⁵ General Court-Martial Order No. M07-036 of 10 Oct 2007

⁶ General Court-Marital Order No. M07-035 of 30 Oct 2007.